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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1008

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, RICK MILLER and ROBERT COLLILEUX,
Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, National Maritime Union of America, AFL-CIO, Rick Miller and Robert Collileux, pray that a Writ of Certiorari be issued to review the Decree of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on November 3, 1966.

Opinions Below

The Decision and Order of the National Labor Relations Board and Trial Examiner's decision, entered as part of the Record in the Court below, nine (9) copies of

which are submitted herewith, is reported in 152 NLRB No. 149 (1965). The Opinion of the United States Court of Appeals for the Eighth Circuit, printed as Appendix B hereto, is reported in 367 F.2d 171 (8th Cir. 1966). The Decree of the United States Court of Appeals for the Eight Circuit is printed as Appendix C hereto.

Jurisdiction

The Decree of the United States Court of Appeals for the Eighth Circuit was entered on November 3, 1966 (Appendix C). The Petition for Rehearing was denied on November 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

(1) Where employees of a river towboat company engaged in transporting coal and grain in barges are on strike, does not the right to engage in a primary strike and primary picketing include the right to appeal to others not to move, clean or load the company's barges even though such work is done when the striking employees are temporarily absent from the barges?

(2) Where employees of a river towboat company spend more than half their working time performing duties aboard the company's barges, are not these barges the situs of their employment even when the crew may be temporarily absent from them?

Statute Involved

The statutory provision involved is the National Labor Relations Act, as amended, Section 8(b)(4)(i)(ii)(B), 29 U.S.C.A. 158(b)(4)(i)(ii)(B).

Statement of the Case

The National Maritime Union of America (NMU), Petitioner herein, is the collective bargaining representative for the unlicensed crew of the M/V "Eleanor Gordon", a river towboat owned and operated by Mid-America Transportation Company. Mid-America, a wholly owned subsidiary of Peabody Coal Company, is engaged in the water transportation of coal and grain in barges on the Mississippi River between St. Louis, Missouri and the Minneapolis-St. Paul area. Mid-America also owns the barges in which the coal and grain is carried.

The normal operation of the M/V "Eleanor Gordon" is to pick up a tow of 15 barges loaded with coal at the docks of the Peabody Coal Company in East St. Louis and move the barges up the Mississippi River to a fleeting area[1] in the Minneapolis-St. Paul area. There the coal barges are "tied off" and the M/V "Eleanor Gordon" picks up a tow of grain barges which previously had been loaded at the Farmers' Union Grain Terminal in St. Paul. These grain barges are taken downstream to St. Louis where the M/V "Eleanor Gordon" picks up a new tow of coal barges and returns north.

The barges loaded with coal are destined for Northern States Power Company pursuant to a contract whereby Mid-America transports the coal to points in the Minneapolis-St. Paul area as designated by Northern States Power Company.[2] Under this contract it is the responsibility of Mid-America, rather than Northern States Power Company, to see that the coal is delivered to the designated points.

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[1] A fleeting area is a place where the barges are left until it is time to take them to a dock for unloading, or conversely, where loaded barges are made into tows for transportation downstream.

[2] The transportation contract between Northern States Power and Mid-America permits Northern States Power to participate in the financing of the construction of the towboat and several barges, and gives Northern States Power an interest in the salvage value of these vessels and the right to acquire them at some future time.

It is not feasible for a boat the size of the "Eleanor Gordon" to operate in a harbor area. Accordingly, the "Eleanor Gordon" ties off its tow in the fleeting area and the work of moving the barges from the fleeting area to the Northern States Power Company docks is done by Twin City Barge & Towing Company pursuant to a subcontract with Mid-America. In performing this work, Twin City did not have any contractual relationship with Northern States Power but rather acted only as the subcontractor of Mid-America, doing work which Mid-America was obligated to do under *its* contract with Northern States Power.

Once the barges are delivered to Northern States Power and the coal emptied, they are then cleaned by Minnesota Harbor Company and taken to the docks of the Farmers' Union Grain Terminal where they are loaded with grain. Twin City Barge & Towing Company then takes them from Farmers' Union Grain Terminal back to the fleeting area to await the arrival of the M/V "Eleanor Gordon" so that they can be transported downstream.

Although their living quarters are aboard the M/V "Eleanor Gordon", the greater part of the unlicensed crew's work actually is done aboard the barges in the tow. This work includes the connecting and disconnecting of the individual barges in the tow, putting out running lights and flags, pumping the bilges, inspecting and repairing the barges on a routine basis and doing all necessary maintenance and navigational work aboard the barges. The men work six-hour watches—six hours on and six hours off. Of this time, *more than half is spent performing tasks on the barges.*

In August of 1964, after numerous efforts to negotiate a collective bargaining agreement had proved fruitless, the unlicensed crew of the M/V "Eleanor Gordon" went on strike. During this strike picketing occurred at the situs of the Mid-America barges (1) when Twin City picked up the barges at the fleeting area, (2) at Minnesota

Harbor Service when the barges were being cleaned and (3) at the docks of the Farmers' Union Grain Terminal when the barges were being loaded with grain. The picket sign was specifically limited to the barges belonging to Mid-America and the picketing was conducted as close to the barges as was physically possible. No barges belonging to any other company were picketed nor were the operations of any other barges affected. Thus, in both intent and result the economic impact of the picketing was strictly limited to the barges belonging to Mid-America.

Despite the fact that the picketing was limited in this manner, the National Labor Relations Board, on a charge filed by Farmers' Union Grain Terminal, issued a complaint alleging that the National Maritime Union picketing was secondary picketing in violation of Section 8(b)(4) of the Act. The Board, adopting the decision of the Trial Examiner, found that the "work situs" of the Mid-America employees was the route of the M/V "Eleanor Gordon" between St. Louis and the fleeting area in Minneapolis-St. Paul [3] and not the barges which were the property of Mid-America and on which Mid-America's employees spent most of their working hours. On the basis of this finding the Board then concluded that any picketing which occurred away from this "work situs" was secondary and contrary to the act.

In addition, the Board held that the activities of Twin City, Minnesota Harbor Service and Farmer's Union Grain Terminal were not the day-to-day activities *of* Mid-America. Actually it was never contended that they were. Rather, it was NMU's contention, as the evidence conclusively showed, that the work performed by these companies was necessary *to* the day-to-day activities of Mid-America and thus might be picketed under this Court's decisions in *United Steel Workers* v. *NLRB*, 376 U.S. 492

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[3] The decision of the Board would require the union to follow the tug up and down the river—a finding which is utterly unrealistic and practically impossible. Navigational impediments and economic factors would preclude any such procedure.

(1964), and *Local 761* v. *NLRB (General Electric)*, 366 U.S. 667 (1961).

The National Maritime Union then filed a petition to review the Board's decision in the United States Court of Appeals for the Eighth Circuit. Although affirming the Board's decision, the Court of Appeals for the Eighth Circuit did not adopt the Board's finding that the work situs was the route of the M/V "Eleanor Gordon" between St. Louis and the fleeting area. Rather, said the Court, "We assume that what they (the Board) meant to say is that the employment situs was the towboat and the towed barges *during the time* the employees worked on them as they plied between the terminals." (Emphasis supplied.) Thus, the Court below in effect held that a vessel ceases to be the work situs of seamen merely because the men temporarily leave the vessel, a conclusion which is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Seafarers' Union* v. *NLRB (Salt Dome)*, 265 F.2d 585 (D.C. Cir. 1959).

In response to NMU's contention that the picketing was primary because the handling, cleaning and loading of the barges was necessary *to* the day-to-day operations of Mid-America, the Court merely stated, "The concept of what is necessary to the day-to-day operations of MAT must have its limitations, too" without, however, indicating what these limits were nor delineating the basis on which it was drawing the distinction between legal and illegal conduct.

NMU seeks review of the decision below because of the extreme importance that it has on the rights of maritime workers on our inland waterways. There are over 80,000 seamen[4] employed on vessels engaged in trans-

[4] There are over 20,000 vessels in operation on our inland waterways on which approximately 80,000 seamen are employed with an additional 80,000 persons employed in directly connected shoreside positions, see *Big Load Afloat*, pages 5, 33 (1965), published by The American Waterways Operators, Inc.

porting barges on our inland rivers. The method of operation here involved, where a towboat moves between fleeting areas and never docks, is the prevailing method of operation. Since it is impossible to picket a moving towboat, river seamen will be denied the right to organize and engage in collective action unless they are afforded the right to picket the barges on which they work. We respectfully submit that the decision below is erroneous for two reasons: First, the transporting of barges to and from the fleeting area as well as the cleaning and loading of the barges, was essential to the day-to-day operations of Mid-America and, therefore, the picketing of this work was primary picketing under the rules set forth by this Court in *United Steel Workers* v. *NLRB*, supra and *Local 761* v. *NLRB* (*General Electric*), supra. Second, the decision of the Court below that the barges ceased to be a "work situs" of the crew once the barges were tied off at the fleeting area is contrary to the decision of the Court of Appeals for the District of Columbia Circuit in *Seafarers' Union* v. *NLRB* (*Salt Dome*). supra, which held that the vessel on which seamen work is their "work situs" and that their temporary absence from the vessel does not change the vessel's status as the work situs.

REASONS FOR GRANTING THE WRIT

I.

The decision of the court below is in direct conflict with the decisions of this Court in *Local 761* v. *NLRB (General Electric)*, 366 U.S. 667 (1961), *United Steel Workers* v. *NLRB*, 376 U.S. 492 (1964), and *NLRB* v. *Fruit and Vegetable Packers*, 377 U.S. 58 (1964), all of which held that picketing addressed to employees performing tasks necessary to the day-to-day operations of the primary employer was protected primary picketing even though conducted away from the job situs of the striking employees.

The NMU picketing was at all times strictly limited to the Mid-America barges at times when they were being used to further Mid-America's business. As such it was primary picketing protected by the National Labor Relations Act. While Section 8(b)(4)(i)(ii)(B) of the Act makes it an unfair labor practice to induce or encourage any person to engage in a strike or refusal to work, it is subject to the proviso that "nothing in clause (B) shall make unlawful . . . any primary strike or primary picketing." Literally interpreted, the portion of Section 8(b)(4)(i)(ii)(B) which precedes this proviso would ban all picketing and all strike activity. This Court, however, has been careful to point out that the language of the proviso precludes such a literal interpretation. *Local 761* v. *NLRB* (*General Electric*), 366 U.S. 667 (1961). Thus, fulfillment of the legislative intent requires that the Court examine the conduct in question in light of the traditional right of unions to seek support for their cause by "appealing to neutral employees whose tasks aid the employer's everyday operations." *Local 761* v. *NLRB* (*General Electric*), 366 U.S. at 681. So long as the Union's conduct is so limited, it falls within the proviso and is protected primary activity.

In *Local 761* v. *NLRB* (*General Electric*), supra, this Court gave careful consideration to the question of distinguishing primary activity from a secondary boycott in a decision which reaches the vital issue in the present case. There, Local 761 was on strike against General Electric and set up picket lines at General Electric's plant in Louisville, Kentucky. The plant had several entrance gates, one of which was reserved exclusively for employees of independent contractors. The Board had held that the Union's picketing at this latter gate was a violation of Section 8(b)(4) of the Act, 123 NLRB 1547. This Court, however, set aside this determination and remanded the case to the Board, holding that if the employees of the independent contractors who use the gate in question were performing work necessary *to* the normal operations of the plant, then the Union was entitled to picket the gate even though it was not used by General Electric's employees.

In reaching this conclusion, this Court reviewed the leading cases on the scope of Section 8(b)(4). Thus, the Court noted that Section 8(b)(4) was not to be interpreted so as to limit the right of a union to engage in the ordinary primary strike, citing *NLRB* v. *International Rice Milling Company,* 341 U.S. 665 (1951), and that "not all so-called secondary boycotts were outlawed," 366 U.S. at 672, 6 L. Ed. 2d at 597. After surveying the Board's treatment of the problem through the evolution of the Moore Drydock[5] tests, the Court concluded that "The key to the problem is found in the type of work that is being performed by those who use the separate gate," 366 U.S. at 680, 6 L. Ed. 2d at 592. The establishment of a separate gate could not be used to circumvent the right of a union to engage in traditional strike activity.

> "On the other hand if a separate gate were devised for regular plant deliveries; the barring of

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[5] Sailors Union of the Pacific, 92 NLRB 547 (1950).

> picketing at that location would make a clear invasion on *traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations.*" 366 U.S. at 681, 6 L. Ed. 2d at 602. (Emphasis supplied.)

Local 761 v. *NLRB* (*General Electric*), supra, thus establishes the principles that (1) inherent in the right to engage in a primary strike is the right to appeal to neutral employees not to perform work essential to the normal operations of the primary employer and (2) that these appeals may be made even though the primary employer's employees are not present at and do not work at the site where the appeal is made.

It is of great significance and extreme importance to the instant case that the decision in *Local 761* was not predicated on the appeals being made at the job site of the primary employer's employees. In fact, no employees of General Electric used the gate that was being picketed. Instead, the test established was the nature of the work being performed by the employees to whom the picketing was directed rather than the location of the picketing.

This right of a union to appeal to neutral employees not to perform tasks which were essential to the day-to-day operations of the primary employer was reaffirmed by this Court in *United Steel Workers* v. *NLRB*, 376 U.S. 492, 11 L. Ed. 2d 863 (1964), where the picketing involved was not even conducted on the primary employer's premises.[6] Picking up where it had left off in *Local 761* v. *NLRB* (*General Electric*), supra, this Court stated:

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[6] In *United Steelworkers* v. *NLRB*, 376 U.S. 492 (1964), the striking employees picketed railroad cars destined for the primary employer at a gate located on another employer's premises This gate was kept locked when not in use and was accessible only to railroad employees. Thus the picketing at this gate necessarily was directed *only* to neutral employees. The Court held such picketing to be primary because it was directed to work which was necessary *to* the day-to-day operations of the primary employer.

"Nor may the General Electric case be put aside for the reason that the picketed gate in the present case was located on property owned by New York Central Railroad and not upon property owned by the primary employer. *The location of the picketing is an important but not decisive factor, and in this case we agree with Judge Lumbard that the location of the picketed gate upon New York Central Property has little, if any, significance*:

"'In this case, it is undisputed that the railroad's operations for Carrier were in furtherance of Carrier's normal business. It is equally clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants others than Carrier. The railroad employees were not encouraged to, nor did they, refuse to serve the other plants. *The picketing was designated to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished.* Because the fence surrounding the railroad's right of way was a continuation of the fence surrounding the Carrier plant, *there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier'*. 311 F.2d 135, 154." (Emphasis supplied.)

As pointed out in the foregoing excerpt, the test of whether strike conduct is primary activity or a secondary boycott lies in its economic impact. If the economic impact is no greater than that which would be achieved by shutting down the primary employer's operations, then the activity in question is protected primary activity. That this is the proper basis for distinguishing primary activity from a secondary boycott appears from this Court's decision in *NLRB* v. *Fruit and Vegetable Packers*, 377 U.S. 58, [illegible] L. Ed. 2d 129 (1964). While that case dealt with consumer

picketing, this Court pointed out that the basic distinction between primary and secondary activity is that secondary activity involves conduct which threatens injury to the neutral employer in his business *generally*, while conduct which affects the secondary employer only in relation to the product of the primary employer is primary activity. Said the Court:

> "... *When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchasers from the struck firms are decreased only because the public has diminished its purchases of the struck product.* On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.
>
> "We disagree therefore with the Court of Appeals that the test of 'to threaten, coerce, or restrain' for the purposes of this case is whether Safeway suffered or was likely to suffer economic loss. A violation of Sec. 8(b)(4)(ii)(B) would not be established, merely because respondents' picketing was effective to reduce Safeway's sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller." (Emphasis supplied.)

Applying the foregoing principles to the instant case, it is clear that the NMU picketing was at all times protected primary activity. It should first be noted that no barges, other than Mid-America barges, were picketed. Both the picket sign and the leaflet which was distributed clearly identified Mid-America as the employer with whom NMU had its dispute, and the picketing occurred as close to the Mid-America barges as was possible under the circumstances. Moreover, there was no picketing when Mid-America barges were not present. Thus, in all these respects NMU fully complied with the *Moore Dry Dock* requirements.

Looking at the individual situations, the work being done by Twin City Barge and Towing Company clearly was necessary to the day-to-day operations of Mid-America. *Twin City actually was a subcontractor of Mid-America, doing work which Mid-America was contractually obligated to perform for Northern States Power Company.* The delivery of the barges to Northern States Power was as important and necessary to Mid-America's day-to-day operations as was the delivery of the railroad cars in *United Steelworkers* v. *NLRB, supra.* In the *Steelworkers* case, this Court sustained the right of the union to urge the railroad employees not to deliver the railroad cars even though the railroad cars *were not* the property of the primary employer. Here, where the barges *are* the property of the primary employer, the right to urge neutral employees not to handle them is even clearer. The work done by Twin City in the instant case also is analogous to the work which was being done by the maintenance subcontractors in *Local 761* v. *NLRB (General Electric),* supra, in that there, as here, the employer had subcontracted out work essential to its own operations. *Local 761* v. *NLRB (General Electric),* supra, makes it clear that such subcontracting does not deprive a union of its right to picket or to urge that such work not be performed. It should also be noted that there was no effort to prevent Twin City

from handling barges of employers other than Mid-America, and that such barges were handled without any interruption whatsoever. Finally the economic impact on Twin City was no greater than that which would have been achieved if the "Eleanor Gordon" had stopped operating and was unable to deliver barges to the fleeting area.

Insofar as Farmers Union Grain Terminal and Minnesota Harbor Company are concerned, the work of loading and cleaning the barges, even though done by neutral employees, similarly was essential to Mid-America's day-to-day operations for if the barges were not cleaned and loaded, the "Eleanor Gordon" would not have any cargo to tow and would have to stop operating. That such work is part and parcel of the day-to-day operations of vessels was recognized by the Board in *Sailors' Union of the Pacific,* 92 NLRB at 549:

> "The multitudinous steps of preparation, including hiring and training a crew and *putting stores aboard,* are as much a part of the normal business of a ship as the voyage itself." (Emphasis supplied.)

The work being done by the employees of Farmers' Union and Minnesota Harbor is analogous to the work of truckers making deliveries to a factory. The only difference is that here, instead of the delivery men coming to the premises of the primary employer, the primary employer, Mid-America, moves its "premises", the barges, to the delivery men. In either case, however, the nature of the work involved, making a delivery to the primary employer, remains the same. In *Local 761* v. *NLRB (General Electric),* supra, this Court held that an employer, by devising a separate gate for regular plant deliveries, could not deprive a striking union of the right to picket such work. The NMU picketing in the instant case falls within this principle and is but an application, in the context of a

martime operation, of the kind of primary activity which this Court has held to be permissible.

The court below refused to follow the decisions in *Local 761* v. *NLRB (General Electric)*, supra, and *United Steelworkers* v. *NLRB*, supra, with the cursory statement, "The distinction lies in the situs." The court then proceeded to hold that picketing was proper only if conducted at the jobsites of the primary employees, the very contention which this court considered and rejected in both the *Local 761* and the *Steelworkers* decisions. In thus refusing to follow these decisions, the opinion below represents a serious departure from established principles in interpreting section 8(b)(4) of the Act. Accordingly, certiorari should be granted upon this ground alone to the end that this erroneous decision may be corrected.

II.

The decision of the court below is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Seafarers' Union* v. *NLRB (Salt Dome)*, 265 F.2d 585 (D.C. Cir. 1959), which held that the vessel on which seamen work is their work situs, the picketing of which is protected primary picketing, even though the crew may be temporarily absent from the vessel.

Both the courts and the Board have recognized that, where seamen are involved, the situs of employment is the vessel or vessels on which they work, and not any particular territorial locale. Thus, in the frequently cited Moore Dry Dock decision, *Sailors' Union of the Pacific*, 92 NLRB 547 (1950), the Board upheld the right of a seamen's union to picket a vessel while it was in a shipyard, stating:

> "In the usual case, the situs of a labor dispute is the premises of the primary employer. Picketing

of the premises is also picketing of the situs; the test of legality of picketing is that enunciated by the Board in the *Pure Oil* and *Ryan Construction* cases. *But in some cases the situs of the dispute may not be limited to a fixed location; it may be ambulatory.* Thus in the *Schultz* case, a majority of the Board held that the truck upon which a truck driver worked was the situs of a labor dispute between him and the owner of the truck. Similarly, we hold in the present case that, as the Phopho was the place of employment of the seamen, *it was the situs of the dispute between Samsoc and the Respondent over working conditions aboard the vessel.*" (Emphasis supplied.)

In *Moore Dry Dock* the Board upheld the right of a seamen's union to picket at a shipyard where the employer's vessel, the "situs" of the dispute, was undergoing repairs. There the picketing occurred at a time when a new crew was being trained aboard the vessel; however, in *Seafarers' Union* v. *NLRB (Salt Dome)*, 265 F.2d 585 (D.C. Cir. 1959), the Court of Appeals for the District of Columbia held that the presence of a crew aboard the vessel being picketed was not essential to the union's right to picket. Since repairs and overhauling were part of the normal operations of a ship, the union had the right to picket such activity even in the *absence of the crew.* Said the Court:

"To us it seems indubitably clear that Salt Dome was engaged in its normal business in overhauling and repairing the Pelican. In this mechanical age overhaul and repair are as normal and as necessary as any phase of an operation involving machinery. Engines of all sorts—trucks, newspaper presses, jets, locomotives, etc., etc.—must periodically be

overhauled and repaired. So much is so clear that it need not be belabored.

". . . .

". . . This boat, a piece of equipment owned by the primary employer, *was actually the situs of the primary dispute.* The primary situs in the dispute was movable and did move normally from place to place. . . . We think that, when an employer under such circumstances moves a piece of equipment onto the property of someone else, for a normal business purpose, striking employees may peacefully picket that equipment even though none but supervisory employees are on or about it. Several propositions support this conclusion. The chief one is that employees should not be held to lose the right to picket peaceably if all employees go out on the strike so that none are left on the employer's property. Another supporting proposition is that the primary employer should not have the power to prevent picketing by merely turning out all his employees. *We think the presence or absence of employees of the primary employer on the premises is not a critical factor in the legality of a picket line.*" (Emphasis supplied.)

In the instant case, the cleaning and loading of the barges, as well as the movement of the barges to and from the fleeting area, was a much more frequent occurrence than the annual overhaul of the vessel involved in the *Salt Dome* decision. The absence of the men from the barges during these routine operations was even more temporary than the crew's absence in *Salt Dome* and did not in any way change the fact that the barges were their regular place of employment. Thus, the holding below

that the barges were the work situs only while the men were working aboard them is in direct conflict with the *Salt Dome* decision. Accordingly, certiorari should be granted so that this conflict may be resolved.

Conclusion

The NMU picketing was strictly limited to the Mid-America barges during times when they were being used to further Mid-America's business. As in both *Local 761* v. (*General Electric*), supra, and *United Steel Workers* v. *NLRB*, supra, the appeal of the picketing was limited to requesting neutral employees to refrain from activities which were necessary to the day-to-day operations of the primary employer. The holding below that such picketing had to be limited to the jobsite of the striking employees thus is in direct conflict with this Court's decision in the *Local 761* and *Steel Workers* cases which held that the locality of the picketing was not the controlling factor and that such picketing was permitted even though conducted away from the primary employer's premises and at areas where the primary employees did not work.

The lower Court's holding that the barges were the situs of employment only while they were in the tow of the M/V "Eleanor Gordon" is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Seafarers' Union* v. *NLRB* (*Salt Dome*), supra, which held that the vessel on which seamen work was the situs of their employment and could be picketed even though the crew was temporarily absent. If allowed to stand, the effect of the lower Court's holding will be to limit striking employees to picketing a moving towboat in mid-stream, a requirement that is both navigationally impractical and economically impossible.

The instant matter is of the utmost importance to the 80,000 seamen employed on our inland waterways. With-

out the right to picket the barges on which they are employed, these employees will be effectively denied the right to organize and exercise the economic rights granted them by the National Labor Relations Act. Accordingly, it is respectfully submitted that Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

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APPENDIX A

Statutes

NATIONAL LABOR RELATIONS ACT
SECTION 8. Unfair Labor Practices.

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

APPENDIX B

Opinion

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,066

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, RICK MILLER and ROBERT COLLILEUX,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Petition for Enforcement of Order of National Labor Relations Board.

[October 10, 1966.]

Before VOGEL, Chief Judge, BLACKMUN, Circuit Judge, and STEPHENSON, District Judge.

BLACKMUN, Circuit Judge.

We are confronted again with an issue of alleged secondary picketing and the interpretation, in a setting of somewhat unusual facts, of § 8(b)(4) of the National Labor Relations Act as amended by the Landrum-Griffin Act of 1959, 29 U.S.C. § 158(b)(4). Jurisdiction is established.

Opinion

National Maritime Union of America, AFL-CIO (which we designate herein as NMU), Rick Miller, its national vice-president, and Robert Collileux, its employee, seek to set aside an order of the National Labor Relations Board issued June 11, 1965, and reported as 152 N.L.R.B. No. 149. The Board in turn requests enforcement of its order. The charging party, Farmers Union Grain Terminal Association (Farmers), has filed a brief amicus curiae favoring enforcement.

Except for a footnote relating to briefs and of no significance here, the Board panel unanimously adopted the findings, conclusions and recommendations of the trial examiner. It thereby determined that NMU in the course of an economic strike against Mid-America Transportation Company (MAT), attempted to and did induce employees of secondary employers to engage in work stoppage and threatened, coerced or restrained those employers with an object of forcing them to cease doing business with MAT, and thereby violated § 8(b)(4)(i) and (ii)(B) of the Act.*

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* § 158. Unfair labor practices . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . .

(4)(i) . . . to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in . . . a refusal in the course of his employment . . . to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

Its order contained the usual cease and desist provisions and called for the posting of notices.

There is no dispute as to the basic facts:

MAT's unlicensed maritime employees are organized and represented by NMU. MAT is engaged in the transportation of bulk commodities by barge on the Mississippi River between docks at East Saint Louis, Illinois, and the fleeting or mooring area at Inver Grove, a few miles down river from Saint Paul, Minnesota. The cargo carried up river is coal destined for Northern States Power Company (NSP). The cargo carried down river is grain. The barges used in these operations are owned or chartered by MAT. They are moved by a towboat owned by MAT. See *Mid-America Transp. Co.* v. *NLRB,* 325 F.2d 87, 88 (7 Cir. 1963).

The towboat (which pushes rather than tows) has an operating complement of about 13 employees. One crew works for 30 consecutive days and then is off for the same length of time while another takes its place. When on duty, crew members at all times remain on the boat or the barges constituting its tow. They work 6-hour shifts. Their personal quarters are on the towboat. The oncoming crew reports at the downstream end. Its first duty is to tie off the barges which the towboat has brought down river. The crew then picks up and prepares the northbound tow. The 27 locks between Saint Louis and Saint Paul are so sized that they require the customary tow of 15 barges (5 in line and 3 abreast) to be split as they go through the locks. A crewman's time is divided about evenly between the towboat and the barges. His work on the barge consists, among other things, of fastening and unfastening cables; putting up the jackstaff flag; pumping, maintenance; inspecting and checking hatches, rigging and running lights; navigation; and particular duties when the boat and tow are passing under bridges or going through locks. Occasionally, a barge is dropped

off at a dock along the way between East Saint Louis and the Inver Grove fleeting area; otherwise, the entire tow is taken to the fleeting area and tied off there. The towboat then picks up the southbound tow and returns to Saint Louis. The boat itself is in continuous operation and makes a round trip about every two weeks. It does not go above the fleeting area and no MAT employee remains with the barges after they are tied off there.

Farmers is engaged in the storage and merchandising of grain for about 150,000 patrons in Montana, the Dakotas, and Minnesota. It owns a terminal at the foot of Chestnut Street on the Mississippi River in downtown Saint Paul. It ships grain from the terminal mainly by barge but also by rail and truck. The barges for its grain are obtained from four or five different companies; about one-third of the grain it ships by barge goes in MAT barges. Most of this grain is destined for the Gulf of Mexico but MAT tows only to Saint Louis. Farmers had a written agreement with MAT which provided, among other things, that MAT would furnish and Farmers would use 100 barges or more during the 1964 navigation season; that each "shall be chartered on a bare boat basis"; that Farmers was responsible for cleaning prior to loading of grain and for loading and unloading its cargo; and that MAT might move the barges by the use of other towing facilities.

NSP is a private utility with plants in the Twin City area. It is under a long term contract to purchase coal from MAT's parent corporation. It has a separate contract with MAT for transportation of the coal. This obligates MAT to deliver to points which NSP designates. There are three of these points up river from the fleeting area. It is MAT's responsibility to see that the barges get to the designated docks. The MAT-NSP contract is silent as to who delivers the barges to the NSP docks. Actual delivery has been made by different towing companies other than MAT.

Opinion

Twin City Barge & Towing Company (Towing) provides towing and harbor services in the Saint Paul area. Specifically, it moves barges, singly or by twos, from the fleeting area to the particular NSP dock which has been designated and, to this extent, fulfills MAT's obligation to NSP. On occasion it cleans barges for MAT. It makes up the southbound tows. It has been doing this work for MAT for six years. MAT is obligated to use Towing if the latter has a boat available unless MAT's customer has designated a different company.

Minnesota Harbor Service, Inc. (Harbor) is engaged at Saint Paul in the towing of barges and in their cleaning, repair and service. It has done some business with MAT since 1962 but did not clean barges for MAT until October 1964; prior to that time it cleaned MAT barges for Farmers and another.

There is no common ownership or control or common officers or directors as between MAT, Farmers, NSP, Towing or Harbor.

The fleeting area facility is owned by the Port Authority of the City of Saint Paul. It is leased to Towing for the use of its barge customers including MAT.

No MAT employee performed any service at the docks of Farmers or NSP. The examiner and the Board specifically found that "MAT did not engage in any activity, in the conduct of its day-to-day operations, above the fleeting area in 1964, and no MAT employees were so engaged in that period".

On August 1, 1964, NMU began a strike against MAT. That morning, Collileux came to Farmers' dock in Saint Paul and distributed a pamphlet to five barge-loader employees of Farmers who were then at work there. The pamphlet referred to NMU's dispute with MAT and asked respect for its picket lines and support for its strike.

Collileux was referred to the shop steward and to the president of the union which represented Farmers' employees. NMU vice-president Miller sent telegrams to that union's president and to Farmers' superintendent requesting assistance.

On that day two MAT barges were at Farmers' dock. Shortly after lunch Collileux began carrying a picket sign on public property near those barges. The sign stated that NMU was on strike against MAT and "We have no dispute with any other employer". No loading of the barges took place so long as Collileux picketed. On August 5 he returned when employees of Farmers were loading a MAT barge there. He appeared again around noon and at that time carried his picket sign for about two hours. The employees of Farmers stopped loading the barge. Farmers then notified its merchandisers that "they could not sell for delivery at a later date until such time as this matter is resolved". Farmers attempted to get barges from other sources but was not entirely successful. MAT offered to supply barges but this offer was not accepted by Farmers. As a result, Farmers "did miss a considerable volume of business".

Towing, whose deck employees are also members of NMU, encountered similar difficulties in August 1964. On August 11 one of its boats was on its way to pick up two MAT barges at Harbor's property in Saint Paul. A deckhand noted a picket on the shore with a sign identical to that carried by Collileux at Farmers. The captain notified his dispatcher and did not move the barges. On August 20 the same boat went to another terminal in the area to pick up a MAT barge loaded with grain. A deckhand noted a picket on the bluff and told the captain "they did not want to pick up the barge". On August 25 another boat was towing barges upstream from the fleeting area to an NSP plant. It was met by a small craft

with a picket aboard. Collileux was the picket and asked the captain to tie the barges off. The captain called his dispatcher and then complied. Towing's president objected about this to NMU's Saint Louis agent. The latter replied that NMU was going to continue and even enlarge its picketing force.

About August 11 Collileux parked his car near the entrance to Harbor's property in Saint Paul with a sign reading "NMU on strike". However, no Harbor employee ceased work because of this.

There were no MAT towboats or MAT employees present at the scene of any of these several incidents.

The trial examiner and the Board found that the picketing was secondary; that the primary dispute was with MAT; that the situs of that dispute was between the East Saint Louis docks and the Inver Grove fleeting area; that MAT's day-to-day activities were confined to that situs; that MAT boats and employees did not engage in activity up river from the fleeting area; that Towing and Harbor were independent contractors; that neither they nor Farmers were engaged in the day-to-day activities of MAT; that NMU's appeals to employees of Farmers, Towing and Harbor and to the union representatives of Farmers' employees were addressed to individuals, within the meaning of the Act; and that this conduct of NMU and its agents violated the cited provisions of the Act.

The parties, for the most part, present the same cases in support of their respective positions. These cases, so far as they are helpful in the light of the language of the statute as it presently reads, reveal the following:

1. The observation is made that Congress consistently has refused to prohibit peaceful picketing "except where it is used as a means to achieve specific ends which experi-

ence has shown are undesirable". *NLRB* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 62 (1964); *NLRB* v. *Drivers Union,* 362 U.S. 274, 284 (1960).

2. Congress, by § 8(b)(4), "did not seek . . . to interfere with the ordinary strike". *NLRB* v. *International Rice Milling Co.,* 341 U.S. 665, 672 (1951).

3. A strictly literal interpretation, therefore, could not be given to that part of § 8(4)(b) which precedes the proviso in sub-section (B). If the section were literally interpreted, it would operate to ban primary activity. *Local 761, Int'l Union of Elec. Workers* v. *NLRB,* 366 U.S. 667, 672 (1961).

4. In enacting the statute Congress had the dual "objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own". *NLRB* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 692 (1951).

5. But not every type of secondary boycott is outlawed by the statute. *Local 1976, United Bhd. of Carpenters,* 357 U.S. 93, 98-99 (1958).

6. The presence of economic pressure on a neutral employer is not necessarily evidence of illegality. Pressure of this kind may be the natural result of lawful primary activity, Indeed,

> "The cases recognize the very practical fact that, intended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own

> employers. . . . The question is the objective." *Seafarers Int'l Union* v. *NLRB,* 265 F.2d 585, 590 (D. C. Cir. 1959).

7. The drawing of the line between what is legitimate "primary" activity and what is proscribed "secondary" activity can be difficult. Nevertheless, "the statute compels the task" and, "In the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent". *Local 761, Int'l Union of Elec. Workers* v. *NLRB,* supra, p. 674 of 366 U.S.; *Seafarers Int'l Union* v. *NLRB,* supra, p. 591 of 265 F.2d.

8. Emphasis is on what is the routine activity of the primary employer and his "every day" or "normal" operations. Where these are involved, picketing, even though it results in an appeal to neutral employees, is usually not proscribed. See *Local 761, Int'l Union of Elec. Workers* v. *NLRB,* supra, p. 680-82 of 366 U.S. Also,

> "The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary ban." *United Steelworkers of America* v. *NLRB,* 376 U.S. 492, 499 (1964).

These two cases disclose that although the location of the picketing is an important factor, it still may not be decisive; they indicate that picketing is not protected merely because it is at the primary employer's property and that it is not proscribed merely because it is on property which, although "proximate" to that of the primary employer, is not owned by the latter.

9. Peaceful picketing at a secondary site has been held not proscribed where it is directed only to a struck product, as contrasted with being directed against all trading with the secondary employer. *NLRB* v. *Fruit & Vegetable Packers,* supra, pp. 63 and 70-71 of 377 U.S.; *NLRB* v. *Upholsterers Frame & Bedding Workers,* 331 F.2d 561 (8 Cir. 1964).

10. A strike situs may be ambulatory. A ship is an example. *Seafarers Int'l Union* v. *NLRB,* supra, p. 590 of 265 F.2d; *Sailors' Union of the Pacific (Moore Dry Dock Co.),* 92 N.L.R.B. 547, 549 (1950).

11. In certain circumstances, "the presence or absence of employees of the primary employer on the premises is not a critical factor in the legality of the picket line". *Seafarers Int'l Union* v. *NLRB,* supra, p. 590 of 265 F.2d. See *Local 618, Automotive Employees* v. *NLRB,* 249 F.2d 332 (8 Cir. 1957); *Milwaukee Plywood Co.* v. *NLRB,* 285 F.2d 325, 328 (7 Cir. 1960); *New Power Wire & Elec. Corp.* v. *NLRB,* 340 F.2d 71, 74 (2 Cir. 1965).

As in the *Steelworkers* case, supra, p. 496 of 376 U.S., it is clear that NMU's activities here fell within the strict language of clauses (i) and (ii) of § 8(4)(b); that NMU's objective, as judged by its actions, was to induce Farmers, Towing, and Harbor to cease handling or loading MAT barges during the pendency of the strike; and that that objective also is within the language of sub-section (B), exclusive of that sub-section's proviso. The question then, is whether NMU's activities are within the area of primary picketing protected by that proviso.

NMU emphasizes that its picketing was peaceful at all times and that Collileux was its only Minnesota picket. It argues that the barges—not the river from East Saint Louis to Inver Grove and not the MAT towboat alone—

were the employment situs; that the work done by Towing was clearly necessary to the day-to-day operations of MAT; that Towing was no more than a subcontractor of MAT and was doing work which MAT was contractually obligated to perform for NSP; that the delivery of the barges was just as important to MAT's day-to-day operations as was the delivery of railroad cars in the *Steelworkers* case; that the railroad cars there were not even the property of the primary employer, whereas the barges here were the property of MAT; that the subcontracting does not deprive NMU of its right to picket any more than it did in the *Electrical Workers* case; that the handling of other employers' barges was not interrupted; that the economic impact was no greater than if the towboat had stopped operating; that the cleaning and loading of barges, even though done by neutral employees, is essential to MAT's day-to-day operations and are a part of those operations; that the work done by Farmers and Harbor is analogous to that of truckers making deliveries to a plant; that the cleaning and loading of barges is more closely related to day-to-day operations than is the overhauling involved in the *Seafarers* case; and that the barges are comparable to the cargo holds of a seagoing vessel except that they can be disconnected and left at the dock while the towboat itself moves on.

There is a certain appeal to this rationale but we are not persuaded by it.

The concept of what is necessary to the day-to-day operations of MAT must have its limitations, too. Fuel, for example, is necessary in the operation of MAT's towboat. Picketing the towboat might well effect economic pressure on any fuel supplier whose delivering employees refuse to cross the picket line. That picketing, by the cases cited, would be legal primary picketing. However, if NMU were to picket the supplier's Kentucky Coal mine or its Oklahoma refinery, that picketing, by the same

cases, would be proscribed. Yet both situations concern the fuel which is necessary to MAT's daily operations. The distinction lies in the situs.

The barges here were owned or chartered by MAT. But we are not persuaded that their wanderings and use up river from the fleeting area were part of MAT's operations, any more than that their wanderings and use down river below East Saint Louis on their way to the Gulf were, for strike purposes, operations of MAT. The significant thrust of the Electrical Workers and Steelworkers cases is in the vital connection of the workers affected with the day-to-day operations of the struck employer. This is emphasized by Mr. Justice White in his opinion in the *Steelworkers* case, pp. 497-98 of 376 U.S. Of course, in one sense, the unloading, cleaning and reloading of its barge are operations relating to MAT's business activity and essential to its business. Presumably, were the barges picketed while they were tied at MAT's East Saint Louis docks, there would be little question as to the propriety of that picketing. On the other hand, were picketing to go on in New Orleans while MAT barges were being unloaded there at a neutral dock by employees of a consignee after those barges had been towed down river from East Saint Louis by a transportation company other than MAT, that picketing would not be proper.

The present case may perhaps fall between these two extremes for, as NMU points out, MAT was contractually obligated to effect delivery of the coal laden barges to designated NSP docks above the fleeting area, and to tow grain laden barges down river from Inver Grove. We think, however, that this additional fact of contractual obligation does not swing the case in NMU's favor. It is clearly established that MAT's towboat did no towing above the fleeting area and that MAT's crew left the

barges there and performed no service of any kind upriver. Towing's and Harbor's and Farmers' uses of the barges were not occasioned by the strike but were their regular and normal business activities. The barges' status as an employment situs, if it was such on the trip upriver, ceased when MAT's transportation ended at Inver Grove. This is not a situation of the primary employees' mere absence from their jobsite, such as the court was concerned with in the *Seafarers Union* case. Instead, the barges had ceased to be the jobsite before Collileux' picketing took place. They had then become, instead, the normal jobsites of secondary employees alone and the picketing was directed to and affected their normal work at such normal sites without the accompaniment or even proximateness of primary status. Every MAT employee was far removed from the picketing.

The Board suggests an analogy which strikes us as a valid one. It is that of a trucking firm which interlines freight and turns over the loaded trailer it owns and has hauled to another trucking company which, in turn, transports the trailer to its ultimate destination. Seemingly, where a union is in a dispute with the originating carrier, its effort to induce employees of the connecting carrier to refuse to handle the trailer is prohibited. See *NLRB* v. *Highway Truckdrivers,* 300 F.2d 317 (3 Cir. 1962); *Teamsters Union (Wilson Teaming Co.),* 140 N.L.R.B. 164. *Cf. Brown Transp. Corp.* v. *NLRB,* 334 F.2d 30 (5 Cir. 1964)

NMU would distinguish the trucking operation from the present barge or maritime one on the ground that the barges are independent vehicles and "are the very reason for the deckhand's employment", whereas the truckdriver's duties with respect to the trailer are so few as to be de minimis. We fail to see the distinction. But if one exists, the relationship between the deckhand

and the barge ceases once the barge is tied off from the towboat and routinely pursues its upriver way under the power of an independent and neutral employer.

Perhaps we should say by way of final clarification that we do not interpret the trial examiner's and the Board's statement that the work situs was the river between East Saint Louis and Inver Grove as meaning precisely that. We assume that what they meant to say is that the employment situs was the towboat and the towed barges during the time the employees worked on them as they piled between the terminals.

Our conclusion makes it unnecessary for us to consider what significance, if any, lies in the "bare boat" reference in the MAT-Farmers agreement.

NMU's petition is denied. Enforcement of the Board's order is granted.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

Decree

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, RICK MILLER AND ROBERT COLLILEUX,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 18,066

Before:

VOGEL, Chief Judge, BLACKMUN, Circuit Judge, and STEPHENSON, District Judge.

THIS CAUSE came on to be heard upon the petition of National Maritime Union of America, AFL-CIO, Rick Miller and Robert Collileux, to review an order of the National Labor Relations Board issued against petitioners, on June 11, 1965, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on March 2, 1966, and has considered the briefs and the transcript filed in this cause. On October 10, 1966, the Court being fully advised in the premises, handed down its opinion denying the Petition for review and enforcing the order of the National Labor Relations Board.

Decree

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Eighth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Petitioners, National Maritime Union of America, AFL-CIO, Rick Miller and Robert Collileux, its officers, agents, and representatives abide by and perform the directions of the Board in said order contained.

Dated: November 3, 1966.